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DECISION



Wotherspoon, P.I.
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-189913

DATE: February 16, 1978

MATTER OF: CADCOM, Inc.

DIGEST:

Since SBA, as a matter of policy, now requires that to be eligible for award of small business set-asides, firm must be small business concern both at time for submission of bids or initial proposals and time for award, GAO will no longer review question of good faith of bidder or offeror self-certification as small business where SBA determines that firm was large on date for submission of initial proposals even though firm might be small at date of award and might have self-certified in good faith at time for submission of initial proposals.

The Naval Regional Procurement Office (NRPO) issued request for proposals (RFP) No. N00600-75-R-5009 on October 19, 1975, for engineering services in support of advance design projects at the Naval Ship Research and Development Center. The solicitation was a 100-percent small business set-aside.

CADCOM, Inc. (CADCOM), ManTech of New Jersey Corporation (ManTech), and other offerors submitted proposals on November 6, 1975, the due date for submission of initial proposals. Offerors were required to certify that they were small businesses at that time. After lengthy negotiations and final evaluation of proposals, NRPO announced on June 28, 1977, that CADCOM was the successful offeror.

ManTech filed a timely size status protest against CADCOM with the Small Business Administration (SBA). On August 11, 1977, the Philadelphia Regional Office of SBA issued a decision holding that CADCOM was " * * * other than a small business concern for this solicitation." This holding was based upon SBA's finding that CADCOM was involved in a joint venture for this procurement with Operations Research, Inc. (ORI), a firm that SBA found

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was other than a small business. SBA chose November 6, 1975, the date for submission of initial proposals, as the date for making the size status determination.

CADCOM filed a protest with our Office on August 17, 1977, and appealed the SBA Regional Office decision to the SBA Size Appeals Board (Board) on August 22, 1977. In its initial letter of protest, and a supplemental letter of September 1, 1977, CADCOM argued that it satisfied the requirements of Armed Services Procurement Regulation (ASPR) § 1-703(b) (1976 ed.), which provides, in pertinent part, that:

"The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he had, or unless he could have (in those cases where a representation as to size of business has not been made), in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers."

CADCOM contended that it had certified in good faith as a small business on the due date for submission of offers, that it is presently a small business, and is therefore eligible for award notwithstanding the SBA Regional Office determination. Award has been withheld by NRPO pending our resolution of the matter.

Because of the SBA determination that CADCOM was not a small business for this procurement, and because SBA is vested with the authority to make conclusive size status determinations, pursuant to 15 U.S.C. § 637(b)(6) (1970), we asked CADCOM to address the issue of GAO's jurisdiction over this case.

CADCOM initially addressed the question of GAO jurisdiction in its letter to our Office of September 19, 1977. Basically, CADCOM argued that while SBA is empowered to make conclusive determinations of size status, it may not decide the question of whether a firm is eligible for award under a particular procurement--that only GAO may make such a determination. In this regard, CADCOM stated:

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"The issue properly posed by this protest is, assuming arguendo, that CADCOM was not a small business in November, 1975 (as the Philadelphia SBA decided) but that CADCOM is not a small business concern, is CADCOM eligible for award under the subject procurement?"

CADCOM stated the specific question to be decided by GAO as "* * * whether CADCOM was in a position as of the date of submission of initial proposals to represent itself as a small business." CADCOM cited a number of our decisions in which we considered the effect of the reasonableness and good faith of erroneous small business self-certifications on awards of contracts. E.g., Propper International, Inc., et al., 55 Comp. Gen. 1188 (1976), 76-1 CPD 400; Capital Fur, Inc., B-187810, April 6, 1977, 77-1 CPD 237.

On October 21, 1977, the Board, in Findings and Decision No. 1091, denied CADCOM's appeal of the Regional Office determination based on a number of findings and conclusions, several of which are relevant to the issue of our jurisdiction in this case.

CADCOM argued before the Board that, pursuant to ASPR § 1-703(b), the two relevant times for determining size status in negotiated procurements are (1) the due date for best and final offers, rather than the date for initial proposals, and (2) the date of award.

The Board concluded, as follows:

"In negotiated procurements, the Board should determine size as of the deadline for submission of initial offers. There may not be any offers submitted after the initial one. Therefore, to base the size determination on the best and final offer could set an illusory and unenforceable standard. Such a rule would encourage large concerns to bid in the hopes that they can change their size status to comply by the time for submission of best and final offers.

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"The deadline for submission of offers in a negotiated procurement is analogous to the bid opening date in an advertised procurement. In fact, ASPR § 1.703(b) fixes them as the determinative dates for purposes of representation of size status. It provides in part that a bidder or offeror must have 'in good faith represented himself as small business prior to opening of bids or closing date for submission of offers. * * *'

"A concern represents itself to be a small business at the time of submission of its offer. Any rule which does not determine size status as of that date would encourage misrepresentation of size status at that time. Furthermore, it would allow the Contracting Officer to consider in the negotiation process the offers of concerns who were other than small. This would divert attention from concerns who had accurately represented their size status at the time of submission of initial offers, to their detriment."

With regard to size status as of the date of award, CADCOM argued that, pursuant to ASPR § 1-703(b), the controlling point in time for a size determination is the time of award and if a firm is determined to be small on that date it is eligible for award if the self-certification was in good faith on the date for submission of proposals even if SBA later determines that it was not in fact small on that date.

The Board disagreed with CADCOM's reading of ASPR § 1-703(b). According to the Board, the phrase in ASPR § 1-703(b) regarding the award date as the controlling point in time for size status determinations is " * * * applicable for the purpose of the contracting officer in the absence of a determination by SBA, applicable to that procurement, that the concern is other than small." Additionally, the Board concluded that a good faith self-certification of size status is no longer effective once the SBA determines that the firm is not small for the purposes of the subject procurement.

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The Board stated that it had held many times that to qualify for purposes of a small business set-aside, a concern must be small at bid opening (or presumably the date for initial proposals in negotiated procurements) as well as award. In support of this view the Board provided this rationale:

"A concern represents itself to be a small business at the time of submission of its bid or offer. It is logical that the concern be held to the accuracy of that representation at that time and not a later date. Any rule which does not determine size status as of that date would encourage misrepresentation of size status at that time in the hopes that the concern's size status would not be protested and that its size status could be changed by the date of award. If not protested, the contracting officer would be considering offers or bids of concerns who were other than small. This would divert attention from concerns who had accurately represented their size status at the time of submission of offers or bids, to their detriment.

"If protested in a timely fashion, the protest is referred to SBA for a size determination. Normally at that time the contract has not been awarded. Thus, for practical as well as other reasons, SBA must take as the determinative date for size purposes, the date of bid opening. Of course if the concern is small as of bid opening but it is claimed that the concern's size status became other than small subsequently, but prior to award, SBA would also look at the size status of the concern at such time."

In conclusion, the Board stated that since CADCOM was other than small as of the date for submission of initial proposals, it was other than small for the purpose of this procurement and thus ineligible for award, and any subsequent change in size status is irrelevant. Therefore, the issue of CADCOM's size at the date of award need not be considered.

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The Board stated further that:

"Once SBA has made a size determination, it is, as Section 8(b)(5) of the Act [15 U.S.C. § 537(b) (6)] states, 'conclusive' on 'Offices of government having procurement or lending powers * * *'. Thus any additional consideration of size status affecting procurement offices would appear to violate the requirement that the SBA determination be 'conclusive.'"

Following the Board's reading of ASPR § 1-703(b), once the SBA determines a firm is not small for purposes of the procurement (even though based on status as of the date of bid opening or submission of initial proposals), the determination is conclusive unless overturned by SBA, the question of whether the firm's self-certification was in good faith becomes irrelevant, and consequently there would be nothing left for GAC to consider concerning size status and eligibility for award. Since acceptance of this view would preclude our review of the instant case, we allowed CADCOM and other interested parties to further address the question of our jurisdiction over this matter.

CADCOM, in a letter of December 20, 1977, disputes the Board's interpretation of ASPR § 1-703(b), and urges us to consider the issue of good faith self-certification and eligibility for award. CADCOM contends that the contracting officer determines eligibility for award based on (1) the SBA's view of a challenged concern's size status as of the date of award and (2) the contracting officer's view as to whether the challenged firm certified its small business size status in good faith on the date initial offers were submitted. CADCOM contends that the plain language of ASPR § 1-703(b), the "legislative history" of the provision, and GAO decisions in the area require SBA to determine size status as of the date of award. If SBA finds the challenged firm to be small at the date of award but large as of the date for submission of offers, then the contracting officer determines the concern's eligibility for award by determining if the self-certification was in good faith. GAO may review this determination, CADCOM argues.

In discussing the "legislative history" of ASPR § 1-703 (b), CADCOM recognized that the language of the provision

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was drafted in response to two GAO decisions, 40 Comp. Gen. 550 (1961), and B-143630, October 13, 1960. According to CADCOM, these two decisions show that the controlling point in time for a size status determination is the date of award, and that a bidder who is small at that time is eligible for award if self-certification was in good faith.

We do not disagree with this reading of the decisions. However, an examination of policies in effect at that time and the context in which these cases were decided may clarify the purpose behind the language added to ASPR § 1-703(b) in response to the decisions.

The ASPR Committee, on April 26, 1961 reported on the status of ASPR Case 61-52 "Determination of Small Business Concerns." The report reads in pertinent part, as follows:

"1. Case 61-52 - Determination of Status of Small Business Concerns. The Committee considered a memorandum from the Director of Small Business Policy, OASD (I & L), dated 18 Apr 61, raising the question of when, during the procurement process, the size formula contained in the SBA's size standards apply; i.e.,

- (i) at the time the self-certification of the contractor is made, or
- (ii) at the time [of] award of the contract.

Representatives of the Small Business Administration Liaison Office and the Assistant Director for Small Business Policy, OASD (I & L), were present for the discussion of this matter. After discussion, the Committee concluded that the Regulation, which states that the contracting officer shall accept at face value ' * * * (ii) a statement by the bidder or offeror that it is a small business concern * * * ' provides a basis for prima-facie evidence upon receipt of self-certification that the concern is a small business which should be relied on unless there is a protest received prior to award. If such a protest is received, or if the contracting officer has other evidence to question the size certification, the size as determined at the time of award governs. In this respect, it was noted that this is the current practice of the

three military departments. The Committee concluded that this practice should be retained and that no change in the Regulation in this respect is needed."
(Emphasis supplied.)

It appears from this excerpt that it was the practice of military contracting officers to accept self-certifications as prima-facie evidence of size until there was some reason to question size. If there was such a question, the practice of the SBA, apparently, was to determine size status as of the time of award. This is one possible system for insuring that procurements set aside for small businesses are in fact awarded to bona fide small businesses, but not the only system, or necessarily the best one.

Our two decisions, then, recognized these policies. In addition, they recognized and addressed a problem inherent in this system--the possibility that a concern that certified as a small business prior to bid opening or submission of proposals would be challenged and found to have been small at the award date, but large at the time it self-certified. To make award to concerns in this situation could easily encourage abuse of the self-certification procedure by large concerns certifying as small in the hope that their size would not be questioned, or that they could become small before award if it appeared that they would receive award.

In 40 Comp. Gen. 550, supra, at 553, 554, we voiced this concern as follows:

"* * * The self-certification procedure was designed to simplify and expedite size determinations and procurement processes. It was hoped that 95 to 99 percent of the cases would be handled under that procedure. Unless the submission of bids under a 100-percent small-business set-aside can be restricted solely to those who, in good faith, can certify in their bids that they are small business, no useful purpose would be served by requiring, in every instance, self-certification on size status. If bidders who, prior to bid opening, cannot in good faith certify themselves as small business may be permitted to delay contract awards in order to allow time to make application to the Small Business Administration for a small business certificate on the basis that their status may have

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changed sufficiently in the interim--between bid opening and award--so as to qualify as small business, the effectiveness of small business set-aside procedure would be seriously impaired. Usually a bidder himself is in a very good position to know his size and knowing this, if he cannot in honesty represent himself as a small business, the interests of orderly and timely procurement require that his bid be rejected as nonresponsive."

In that decision, and thereafter, we required that to be eligible for award a challenged bidder must not only be small at the award date, but must have certified (or been able to certify) in good faith that it was small prior to bid opening. This requirement then was incorporated into ASPR § 1-703(b) in 1962, when the following language was added:

"The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has in good faith represented himself as a small business prior to the opening of bids or closing date for submission of offers (see §2.405(b) of this chapter with respect to minor informalities and irregularities in bids). 27 Fed. Reg. 1685-7 (1962)."

The test of good faith in this context has been one of a high degree of prudence and care. See 51 Comp. Gen. 505 (1972). Additionally, we have held that:

"* * * where a bidder's change in status before award from large business to small business after a good faith self-certification is brought about by the bidder's affirmative acts, we have held that such a bidder may not be considered as a small business concern for purposes of a set-aside award because to do so would give the bidder an option after bids are opened of determining whether it would be in his best interest to take action, or not to take action, to become eligible for award. See 41 Comp. Gen. 47 (1961)." (Emphasis supplied.)
49 Comp. Gen. 1,3 (1969).

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So, while conceivably there might have been many factual circumstances where a bidder was large at bid opening, but small at award and therefore potentially eligible for award, our standards severely limited these circumstances to protect the integrity of the self-certification procedure.

At some point the SBA apparently decided--as a means to protect the integrity of the self-certification procedure and insure awards of set-aside procurements to bona fide small business concerns--to require concerns whose size status is challenged to be small on both the award date and the date for bid opening or submission of proposals. Consequently, the SBA began making size status determinations of challenged firms on the date for bid opening or submission of proposals, as in this case. In a letter of December 30, 1977, to us concerning our jurisdiction over this case the SBA stated:

"Upon receiving a timely protest, SBA will not rule a concern to be eligible for award as a small business concern unless it is small at bid opening as well as date of award. There are numerous prior decisions of the Size Appeals Board to this effect cited in the Digest of the Decisions of the Size Appeals Board at XIV-A."

In Sentinel Protective Services, Inc., 56 Comp. Gen. 1018 (1977), 77-2 CPD 248, an SBA Regional Office had determined that a challenged firm was a small business. When this was appealed, however, the Board determined that the concern was large. A disappointed bidder protested to our Office that the challenged firm had not self-certified in good faith. We declined to consider the issue of good faith, and instead asked SBA why varying results had been reached at the Regional and Board levels. In its response, SBA stated, in part:

"The difficulty in our Columbus District Office decision probably arose out of the distinction between size status at the time of bid opening and size status at the time of award. Although the general position of the Size Appeals Board is that the concern in question must be small at both of the relevant times, a field office might fail to consider appropriately size status at time of bid opening."

We then recognized SBA's change in policy when we stated:

"In view of the fact that, under Armed Services Procurement Regulation (ASPR) § 1-703(d)(3), award may be made on the basis of the small business size status determination of the SBA District office, it is essential to the integrity of the small business size self-certification procedure that SBA insure consistent application of the existing standards based on a thorough review of all the relevant information available. Consequently, we are recommending to the SBA that it take appropriate action, including amendment of its regulations, to insure that all SBA District offices are aware that, to be eligible for award as a small business, the prospective contractor must be small both at the time of bid opening and at the time of award, based on the standard applicable at the time of award. Cf. 42 Comp. Gen. 219 (1962)." (Emphasis supplied.)

The SBA, by letter of October 20, 1977, responded to our recommendation, stating, in part:

"We fully agree with your suggestion that the SBA field office decision should have included the status of the firm's size at the time of bid opening. The rule pertaining to a finding as to the small business size status of a firm both at the time of bid opening and time of award has been in effect in a procedural manner in this Agency for several years. This rule has been included in the Digest of Decisions of the SBA Size Appeals Board, copies of which have been made available to our field offices.

"We intend to issue a memorandum to each of our Regional and District Directors in which we shall specifically direct their attention to the current Agency policy that, for purpose of Government set-aside procurements, the size of a firm must be determined as of the date of bid opening and date of award, if the latter is known at that time.

"Also, we plan to review our policy in this regard. One of the options in this review will be to specify

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in our Regulations the time or times at which a concern must meet the applicable size standard in order to qualify as a small business concern for purposes of Government set-aside procurements."

CADCOM disputes our result in Sentinel, claiming that the variance in the SBA Regional and Board determinations was caused by inadequate and erroneous investigation on the part of the Regional Office and confusion on the part of the Board regarding the proper date for making the size determination, rather than from the Regional Office's failure to consider size status as of bid opening. Additionally, regarding our recognition of SBA's change in policy, CADCOM states that:

"* * * the second sentence of the Comptroller General's disputed statement in Sentinel seemingly ignores the plain meaning of ASPR 1-703(b) and appears to give credence to the SBA's erroneous interpretation of that provision. CADCOM has demonstrated in its submissions to your office the legal error in SBA's position. The subject protest provides the proper opportunity for the Comptroller General to clarify his position on the controlling date for size determination purposes and the effect of an offeror's good faith self-certification of small business size status."

While we do not necessarily disagree with CADCOM's interpretation of ASPR § 1-703(b), we do not feel that the existence of that provision per se requires us to refuse to recognize the change in SBA's policies discussed above. As CADCOM has shown, the relevant language of that provision was drafted to reflect our decisions. As discussed above, these decisions recognized the then current policy of SBA to determine challenged size status as of award date, and represented an attempt to limit the potential abuse of the self-certification procedure inherent in that policy.

By now requiring that, to be eligible for award of small business set-asides, a firm be small both at bid opening or the date for submission of proposals and the date of award, SBA has eliminated both the basis and the need for our review of the good faith of the self-certification of a challenged firm. It is our opinion that the "practical" reasons for this

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policy advanced by the Board in Findings and Decision No. 1091 are an adequate justification for the policy change.

While we recognize that, as CADCOM asserts, ASPR has the force and effect of law, we also recognize that, as the agency primarily responsible for effectuating the policies of Congress as expressed in the Small Business Act, 15 U.S.C. § 631 et seq. (1970), the views of the SBA as expressed in formal decisions of the Board must be given great weight. See, e.g., Begley v. Mathews, 544 F.2d 1345 (6th Cir. 1976). In this situation, we have a conflict between language in an ASPR provision drafted in response to GAO decisions aimed at eliminating a problem inherent in the previous SBA policy and Board decisions expressing current SBA policy which handles that very problem. In these circumstances, we feel that the conflict must be resolved in favor of SBA's current policy.

Therefore, we affirm our decision in Sentinel regarding the appropriate time for size status determinations in formally advertised procurements. Further, SBA is designated by law to define within general standards what constitutes a small business (15 U.S.C. § 632) and to determine which firms are small (15 U.S.C. § 637(b)(6)). Accordingly, it is proper to apply SBA's policy that to be eligible for award of a negotiated small business set-aside a concern must be small both at the time for award and the time for submission of initial proposals. Consequently, GAO will no longer review the question of the good faith of a bidder or offeror's self-certification of small business size status.

In the present case, SBA has determined that CADCOM was not a small business at the time for submission of initial proposals, and this determination is conclusive, pursuant to 15 U.S.C. § 637(b), and will not be reviewed by our Office.

By letter of today to the Administrator, SBA, we are recommending that appropriate action be taken as soon as possible to definitize and disseminate the Administration's current policy to the cognizant regulatory authorities over Government procurement.

Accordingly, the protest is dismissed.

Deputy

R. G. Kistner
Comptroller General
of the United States



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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

IN REPLY
REFER TO: B-789913

February 25, 1978

The Honorable Marjorie S. Holt
House of Representatives

Dear Ms. Holt:

We refer to your letter to our Office dated December 5, 1977, in regard to the protest of CADCOM, Inc., concerning the proposed award of a contract under solicitation No. N00600-76-R-5009, issued by the Naval Regional Procurement Office.

By decision of today, copy enclosed, we have dismissed the protest.

Sincerely yours,

Deputy


Comptroller General
of the United States

Enclosure

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

IN REPLY
REFER TO: B-189913

February 16, 1978

The Honorable A. Vernon Weaver
Administrator, Small Business
Administration

Dear Mr. Weaver:

In our decision of today in B-189913, copy enclosed, we dismissed the protest of CADCOM, Inc., against the proposed award of a contract to ManTech Corporation of New Jersey, under Request for Proposals No. N00600-76-R-5009, issued by the Naval Regional Procurement Office.

In our decision we have recognized your current policy of requiring that, to be eligible for award of a small business set-aside, a firm must be small at both the time for submission of initial proposals and the time for award. As discussed in our decision, however, there is an apparent conflict between this policy and the requirements of Armed Services Procurement Regulation § 1-703(b) (1976). We suggest that you notify the appropriate regulatory authorities over Government procurement of your policy.

Sincerely yours,

Deputy


Comptroller General
of the United States